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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In Re Applications of	)	
	)	
LIBERTY CABLE CO., INC.	)	
	)	
For Private Operational Fixed	)	WT DOCKET NO. 96-41
Microwave Service Authorizations and	)	
Modifications	)	
	)	
New York, New York	)	

To: Hon. Richard L. Sippel, Administrative Law Judge

TIME WARNER CABLE OF NEW YORK CITY AND PARAGON COMMUNICATIONS' SECOND SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Dated: November 19, 1997

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SUMMARY

The substantial record evidence in this proceeding, including Liberty's Internal Audit Report ("Report"), shows that Liberty has knowingly and repeatedly violated the Communications Act and the Commission's rules and policies in both the license application process and this hearing proceeding, and has, thereby, demonstrated that it lacks the requisite character qualifications to hold FCC licenses for the microwave facilities for which it has applications pending.

The Report was produced to TWCNYC and the Presiding Judge in September 1997, and was subsequently admitted into evidence in this proceeding. The Report is decisionally significant to the outcome of this licensing proceeding for several reasons. First, the Report reveals numerous instances in which Liberty activated a microwave path without Commission authorization, in many cases without even having filed an application for the path being activated. Thus, the Report shows that the "premature" activation of the 19 paths that are the subject of the license applications at issue in this proceeding was not an isolated incident. Rather, it was the product of a pattern and practice of disregarding the Commission's regulations that Liberty followed since 1992.

Second, the Report shows that, even though Liberty had a licensing compliance program in place prior to the one established as a result of the internal investigation, Liberty did not follow that program after Mr. Nourain took over Liberty's licensing responsibilities in 1992. Not only did Liberty not follow licensing procedures that were established by Mr. Stern prior to 1992, but Liberty also ignored the specific warnings of its FCC counsel that its engineer was in danger of violating the Commission's Rules.

Third, the Report's findings contradict deposition and hearing testimony, and thereby impeach the credibility of testimony by Liberty's principal witnesses. The Report flatly contradicts testimony by Mr. Ontiveros, Mr. Nourain, Mr. McKinnon and Ms. Richter. The Report should be given more weight than the testimony it impeaches because Liberty has relied on the Report to support is applications and requests for STA; the Report summarizes an investigation that occurred closer in time to the activities in question than the witnesses' testimony in this proceeding; the investigation was conducted by Liberty agents in a non-threatening situation; and the Report contains findings that are against Liberty's interest.

In 1995, Liberty made material statements to the Commission in support of the captioned applications that Liberty knew to be false. For example, Liberty claimed that it was its "pattern and practice" to await FCC authorization prior to commencing microwave service. However, Liberty knew that this was not the case. As of the date of that statement, nearly half of Liberty's microwave paths had been activated without Commission authorization. Liberty also contends that the first any of its principals knew of any illegal microwave operations was late April 1995. The Report states, however, that Mr. McKinnon -- a principal of Liberty, as a matter of law -- was aware of Liberty's illegal operations prior to his departure from Liberty in May 1993. Moreover, there is significant circumstantial evidence that Mr. Price and others within Liberty's top management were aware of the premature operations prior to Mr. McKinnon's departure as well.

The Report also provides additional evidence of Liberty's blatant abuse of the discovery process in this proceeding. Of the four carefully chosen documents that Liberty attached to the Report, only one -- a self-serving memo from Mr. Price to Mr. McKinnon -- was produced during the normal course of discovery. Another was produced, pursuant to the

Presiding Judge's Order, out of time; and its existence was not even revealed until after the first wave of hearings had concluded. The remaining two were never produced, even though scores of other contemporaneous documents were produced during discovery.

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TIME WARNER CABLE OF NEW YORK CITY AND PARAGON COMMUNICATIONS' SECOND SUPPLEMENTAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Time Warner Cable of New York City and Paragon Communications (collectively, "TWCNYC") submit this Second Supplemental Proposed Findings of Fact and Conclusions of Law in accordance with the Presiding Judge's Order. Order, WT Docket No. 96-41, FCC 97M-185 (rel. Nov. 10, 1997).

I. Procedural History

1. This proceeding implements a Federal Communications Commission ("Commission" or "FCC") Hearing Designation Order and Notice of Opportunity for Hearing, 11 FCC Rcd 14133 (1996) ("HDO"). TWCNYC has set forth a detailed procedural history through June 1997 in prior papers filed with the Presiding Judge. Findings, ¶¶ 1-9; Supp. Findings, ¶¶ 1-12.[1]

[1]Hereinafter, citations to "Findings/Conclusions," "Supp. Findings/Conclusions," and "Second Supp. Findings/Conclusions" refer to TWCNYC's pleadings by those names in this proceeding. Citations to Liberty's corresponding pleadings are preceded by "Liberty."

2. Prior to the issuance of the HDO, Liberty Cable Co., Inc. ("Liberty")[2] submitted, ex parte, an Internal Audit Report (the "Report") to the Commission's Wireless Telecommunications Bureau (the "Bureau") in response to a Section 308(b) inquiry. See 47 U.S.C. § 308(b); TWCV Exs. 28, 33, 67. The Report purports to be the result of Liberty counsel's investigation into Liberty's compliance with FCC regulations in applying for microwave licenses and in commencing operation of new microwave paths. See TWCV Ex. 67, at 1.

3. Following the D.C. Circuit's affirmance of a Commission Order that it do so, Liberty produced the Report to TWCNYC on September 16, 1997. Bartholdi Cable Co. v. FCC, 114 F.3d 274 (D.C. Cir. 1997), aff'g Liberty Cable Co, 11 FCC Rcd 2475 (1996).

4. On October 1, 1997, TWCNYC filed a Motion to Place Documents in Evidence, to Take Additional Discovery and to Compel Discovery Responses ("TWCNYC Motion"), based on the production of the Report. In particular, TWCNYC moved the Presiding Judge to receive the Report in evidence and to permit limited discovery on the factual foundation for statements contained in the Report, in light of the credibility issues it raised with respect to testimony of several of Liberty's key witnesses on a matter central to this proceeding -- their knowledge of Liberty's unlicensed activation of microwave facilities. TWCNYC Motion, at 6-13.

5. The Presiding Judge initially granted TWCNYC's Motion, stating that findings in the Report "seem[ed] to be directly contra to the crux of Liberty's defense that principals of Liberty and Liberty's outside counsel were unaware of the activations until late April

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[2]TWCNYC is aware that Liberty Cable Co., Inc. is now known as "Bartholdi Cable Company, Inc." following the sale of most of the former Liberty's assets (including its name) to a subsidiary of RCN Corporation. However, for clarity, the applicant for the licenses at issue in this proceeding will be referred to by its former name, "Liberty."

1995." Order, WT Docket No. 96-41, FCC 97M-177 (rel. Oct. 24, 1997). However, at a status hearing held on November 5, 1997, the Presiding Judge reversed his ruling and ordered the filing of supplemental findings related to the Report without allowing any further discovery. See Order, WT Docket No. 96-41, FCC 97M-185 (rel. Nov. 10, 1997).[3]

II. The Report Is Decisionally Significant Because It Demonstrates (1) Liberty's Extensive Practice Of Operating Illegally, (2) Liberty's Disregard For FCC Regulations, And (3) Liberty's Lack Of Credibility Regarding When It Initially Knew About The Widespread Activation Of Microwave Paths Without FCC Authorization.

6. The purpose of this proceeding is to determine whether Liberty possesses the necessary character qualifications to be granted microwave licenses by the FCC. See Findings, ¶¶ 1-2. The hearings have focused specifically on Liberty's candor and credibility regarding when it initially learned of microwave path activations without FCC authorization. Findings, ¶ 8; Supp. Findings, ¶¶ 8, 10. Liberty claims that neither itself nor its counsel had such knowledge until late April 1995. See Liberty Findings, ¶¶ 59, 79, 91, 95; Liberty Supp. Findings, ¶ 40. The Report reveals Liberty's long-standing practice of prematurely activating microwave paths, as well as Liberty management's and its FCC counsel's knowledge of that practice as early as 1993. As such, the Report conclusively demonstrates

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[3]TWCNYC takes exception to the Presiding Judge's sua sponte reversal of his October 24 decision permitting the limited discovery that TWCNYC had requested and that the Bureau had supported. In light of the Presiding Judge's ultimate denial of TWCNYC's discovery requests to establish the complete factual basis for the Report and, possibly, to clear up any ambiguities in the Report's language, TWCNYC has no alternative but to consider the Report as authoritative and unambiguous for purposes of these Second Supplemental Proposed Findings. In so doing, TWCNYC is not abandoning its position that its requested discovery should have been allowed, as the Presiding Judge's October 24 Order permitted. Having opposed TWCNYC's requested discovery, Liberty should not now be heard to argue the Report's unreliability, ambiguity or other asserted deficiency that could have been eliminated through discovery.

Liberty's persistent inability to operate within the Commission's regulations and establishes its lack of credibility before the Commission.

A. The unauthorized activations at issue in this proceeding are part of Liberty's established practice of illegally activating microwave paths.

7. In a Surreply, filed May 17, 1995, Liberty asserted that "[i]t has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational." TWCV Ex. 18, at 3. At the January 1997 hearing, Peter Price, Liberty's President and Chief Executive Officer, admitted that there was a divergence between Liberty's professed policy of complying with the law and its actual pattern and practice. Findings, ¶ 170. Nevertheless, Liberty has continued to characterize the premature activations at issue as "inadvertent" (Liberty Findings, ¶ 64), and as merely "an embarrassing and devastating episode in the company's history." Liberty Findings, ¶ 87. The Report proves undeniably that, rather than having a pattern and practice of *complying* with FCC regulations, Liberty has engaged in a pattern and practice of *disregarding* FCC regulations since 1992.

8. In the Report, Liberty admits that since June 1992, "numerous instances occurred in which microwave path service was initiated before receiving specific FCC authorization." TWCV Ex. 67, at 4. From June 1992 through August 1995, Liberty activated 93 microwave paths -- approximately 75 percent of its operating paths -- without FCC authorization. See id. Significantly, Liberty initiated service on 36 of the prematurely activated paths (approximately 40 percent) prior to even filing an application. TWCV Ex. 67, Exhibit B (Charts 2, 3).

9. Liberty explains the premature activation of the 19 paths at issue in this proceeding as the byproduct of miscommunication between Behrooz Nourain and Liberty's

FCC counsel. Liberty Findings, at iii & ¶¶ 40, 41. Mr. Nourain specifically blames Mr. Lehmkuhl, Liberty's FCC counsel, for the unauthorized activations, because he did not automatically file STA requests with each application. Nourain, Tr. 712-25.

10. Liberty cannot justifiably hold its FCC counsel responsible for its own illegal actions. The Report discloses a pattern of unauthorized activations commencing in 1992 and continuing without interruption until April 1995. Since Mr. Lehmkuhl only performed Liberty's licensing work starting in June 1994 (Findings, ¶ 11), his actions could not have caused the widespread unauthorized activations that occurred in the two years prior to his employment. Moreover, Liberty's other FCC counsel cannot be responsible for Liberty's own practice of ignoring FCC regulations.[4] For example, during his first year at Liberty, Mr. Nourain was supervised by Bruce McKinnon, Liberty's Executive Vice President and Chief Operating Officer. Liberty Findings, ¶ 24. Mr. McKinnon knew that Liberty needed a license prior to activating a path; he signed all license applications until he left Liberty in May 1993; and he knew when Liberty had a license. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 27-30. Nevertheless, under Mr. McKinnon's management of Liberty, 23 paths were activated without FCC authorization, 19 of which were activated prior to an application being filed. See TWCV Ex. 67, Exhibit B (Chart 3). Liberty's counsel is not responsible for this behavior.

11. The illegal operation of the 19 microwave paths at issue in this proceeding is neither an aberration nor an isolated episode in Liberty's history. The only explanation for these violations, which occurred during the tenure of three different licensing attorneys for Liberty, is that it was Liberty's policy to activate new microwave facilities whenever it was

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[4]See Part II.B., *infra*, regarding Liberty's routine practice of ignoring licensing procedures, as well as advice regarding FCC regulations.

commercially necessary, without regard to FCC authorization. Operations manager Tony Ontiveros, knowing that service to "one or two" buildings had been commenced illegally, "raised the issue of unrealistic time constraints . . . at a meeting in December of 1994" but no changes were made. TWCV Ex. 67 at 13-14. Liberty continued its pattern of unlicensed activations. In January 1995, Peter Price was told by Liberty's FCC counsel that the pendency of petitions to deny filed by TWCNYC would delay indefinitely FCC action on Liberty's pending microwave applications and that, under such circumstances, even STAs were unlikely. See Findings, ¶¶ 38, 128, 306. Despite this adverse news, there was no change in Liberty's business practices, no rush to explain to buildings scheduled to receive Liberty's service that that service might be delayed and no directive to marketing representatives responsible for recruiting new buildings to be wary of making promises about when service would begin. Findings, ¶ 307.

B. Despite the existence of a compliance program and distinct advice from a consultant and counsel, Liberty has not followed FCC regulations, and thus cannot be relied upon to comply with FCC regulations in the future.

12. Liberty has stated that its pending applications should be granted because it has "develop[ed] a program to insure that licensing violations will not occur in the future." Liberty Findings, at 73. Liberty has also represented that "going forward, Liberty can be relied upon to comply fully with the law." Liberty Opposition to TWCNYC Motion, October 15, 1997, at 18. The Report, however, evidences Liberty's complete disregard of past compliance procedures and compliance instruction from its consultant and FCC counsel.

13. When Joseph Stern, Liberty's microwave consultant, was responsible for monitoring Liberty's licensing process (before 1992), his operating policy was not to initiate service on a microwave path until receiving FCC authorization. TWCV Ex. 67, at 5. In

June 1992, Mr. Nourain assumed responsibility for licensing. By then, Liberty had developed a procedure to ensure compliance with FCC requirements. Before transferring his duties, Mr. Stern met with Mr. Nourain "to review [Liberty's] practice with regard to licensing, the history of Liberty's licensing activity, the process for coordinating the paths and filing license applications, the general timing of the licensing procedure and the necessity of working with [Pepper & Corazzini] in the licensing process." TWCV Ex. 67, at 7 & Exhibit E. Mr. Stern also "emphasized the necessity of tracking the FCC licenses with individual buildings." Id. at 7. Mr. Stern summarized his meeting with Mr. Nourain in a memorandum that was received by Messrs. Nourain, Price, McKinnon, and Ontiveros. TWCV Ex. 67, Exhibit E. The numerous instances of unauthorized activations revealed in the Report indicate that Mr. Nourain did not follow Liberty's "well-established" policy and procedures (id. at 8-9), and that no one in Liberty's management thought it was important to ensure that he did follow them.

14. The Report also concludes that, upon discovering that Liberty was operating some paths without authorization, Jennifer Richter, Liberty's FCC counsel, informed Liberty of "the importance of complying with FCC procedures" in a letter dated April 20, 1993. TWCV Ex. 67, at 11 & Exhibit F.[5] The letter was sent to Messrs. McKinnon and Nourain, and Mr. Nourain forwarded a copy to Mr. Price. TWCV Ex. 67, Exhibit F. The letter indicates that there was some confusion in Mr. Nourain's mind about FCC requirements, and details the parameters within which activation of microwave paths is permitted. TWCV Ex. 67, Exhibit F. The intent of Ms. Richter's letter was to warn Mr. Nourain's superior, Mr. McKinnon, of the dangers of not complying with the Commission's licensing procedures.

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[5]TWCV Ex. 67, Exhibit F -- Ms. Richter's letter of April 20, 1993 -- is the same document as TWCV Ex. 51.

See id.; Richter, Tr. 2054-55; TWCV Ex. 55 (Richter Deposition, 5/12/97), at 84-87. At a minimum, after receiving a copy of this letter, Mr. Price should have concluded that a review of Mr. Nourain's activities and Liberty's compliance procedures was necessary. He took no such action, and Liberty continued to activate new microwave paths without authorization.

15. Ms. Richter's letter also conclusively established that the Hughes experimental license could not be used for the provision of commercial service. TWCV Ex. 51. Furthermore, in January 1992, Mr. Stern informed Messrs. Price and McKinnon that the Hughes license was not available for commercial purposes. TWCV Ex. 67, Exhibit C, at 3-4. Thus, Liberty knew, as of January 1992 (and certainly as of April 1993), that it could not serve subscribers under the Hughes experimental license while it awaited grant of its pending license applications. See TWCV Ex. 67, at 12-13.

16. Despite the supposed existence of compliance procedures, explicit direction from its FCC counsel regarding the details of FCC microwave licensing requirements, and a warning from that same counsel that its engineer did not have a proper understanding of the requirements of the Commission's Rules, Liberty's management took no action to ensure that it complied with FCC rules. That any particular activation had been authorized was a fortuity, and not a product of an intent to await a grant of FCC authorization prior to activating a new path. Liberty's belated promise, after having been caught in multitudinous violations of the Communications Act and the Commission's regulations, to take the FCC regulations seriously should not mitigate the impact on Liberty of its previous knowing violation of the law, nor shield Liberty from disqualification from holding additional FCC licenses.

C. The Report, which has been characterized by Liberty as accurate and comprehensive, contains findings that directly contradict testimony, and that indicate Liberty knew of its illegal operations prior to April 1995.

17. The Report finds that Liberty employees and its Chief Operating Officer, in addition to its FCC counsel, were aware prior to April 1995 that Liberty had activated microwave paths without FCC authorization. These findings contradict deposition and hearing testimony, and thereby impeach the testimony of Liberty's principal witnesses.

18. The Report states that "Mr. Ontiveros, the Company's General Manager [of Technical Operations], learned at some point in late 1994 or early 1995 that one or two buildings had been improperly activated." TWCV Ex. 67, at 13. At the January 1997 hearing, Mr. Ontiveros testified that he did not learn about improperly activated buildings until late April 1995. Ontiveros, Tr. 1701.

19. Moreover, the Report also implies that Mr. Nourain knew he was operating without appropriate FCC authorization before 1994: "Other than Mr. Nourain, it appears that Mr. McKinnon was aware *from Mr. Nourain* that some buildings were being activated without a specific FCC license or STA." TWCV Ex. 67, at 11 (emphasis added). Mr. McKinnon's tenure at Liberty ended in mid-1993. At the January 1997 hearing, Mr. Nourain testified that he did not have knowledge of premature activations prior to April 1995.

> Q: Okay. Is it clear to you, Mr. Nourain, sitting here today that you had no knowledge of the premature activations prior to the week of April 24, 1995?
> A: Yes.
> Q: Do you have any reason to believe that anyone else at Liberty had knowledge of the premature activations before the week of April 24, 1995?
> A: No reason.

Nourain, Tr. 987.

20. More significantly, the Report states that it "appear[ed] that Mr. McKinnon was aware from Mr. Nourain that some buildings were being activated without a specific FCC license or STA." TWCV Ex. 67, at 11. At his June 5, 1996 deposition, Mr. McKinnon testified that "[Liberty] never activated a path without a license from the FCC." TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 13. At his May 14, 1997 deposition, Mr. McKinnon testified that he was not aware of any unauthorized activations. TWCV Ex. 53 (McKinnon Deposition, 5/14/97), at 23. From 1991 until May 1993, Mr. McKinnon was Liberty's "Chief Operating Officer with day-to-day responsibility for operations and installations of buildings that contracted for Liberty service." TWCV Ex. 67, at 10. Mr. McKinnon previously testified that when he was at Liberty, the operations department waited until it actually received a license before activating a microwave facility. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 8-9, 12. However, the Report indicates that when Mr. McKinnon was responsible for operations (through May 1993), 23 paths were illegally activated, including 19 that had been activated prior to an application having been filed. See Second Supp. Findings, *supra*, ¶ 10.

21. Another serious contradiction of the testimony of Liberty's witnesses is created by the following unequivocal statement in the Report: "Pepper & Corazzini became aware in April 1993 that Liberty had in certain instances initiated microwave service prior to obtaining licenses." TWCV Ex. 67, at 15. The Pepper & Corazzini attorney that acquired this awareness is most likely Jennifer Richter. She is the person who, on April 20, 1993, wrote Mr. McKinnon about conversations she had been having with Mr. Nourain that "gave [her] pause." TWCV Ex. 51, at 1. In her May 1997 deposition, Ms. Richter denied ever being told of any unauthorized activations by Liberty.

> Q: Did Mr. Nourain tell you in this call [of April 2] that Liberty was in fact operating paths that had not been granted, that is had not been licensed?
> A: No one at Liberty including Behrooz *ever* told me they were operating something that had not been granted.

TWCV Ex. 55 (Richter Deposition, 5/12/97), at 78-79 (emphasis added). Liberty has also stated, *in this proceeding*, that its FCC counsel did not know of any premature activations until April 27, 1995. Liberty Reply Findings, ¶ 1.

22. The Report cites to the Richter letter when it notes that Pepper & Corazzini never communicated its knowledge about unauthorized activations to Liberty, but instead sent Liberty "a letter which indicated generally the importance of complying with FCC procedures." TWCV Ex. 67, at 11. The persons conducting the internal audit had the letter and they had access to the attorneys at Pepper & Corazzini. Since the Report does not state that the letter is evidence of Pepper & Corazzini's knowledge of unauthorized activations, its conclusion that Pepper & Corazzini knew of the unauthorized activations necessarily is based on more than just the letter. That conclusion had to have been based on other undisclosed documents or on interviews with Pepper & Corazzini lawyers.

23. The Report's findings regarding Liberty witnesses' knowledge of premature activations should receive *more* weight than the testimony it contradicts for several reasons.[6] First, until this hearing, Liberty has relied on the Report to support its applications and requests for STA and has stressed the Report's accuracy. Shortly after initially submitting the Report to the Bureau, Liberty's counsel stated: "I firmly and confidently conclude that neither the FCC nor any investigative body could have ascertained what the [investigating] Firm did either in terms of its comprehensiveness nor its accuracy." TWCV Ex. 29, ¶ 6.

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[6]In proposing this Finding, TWCNYC is not abandoning its position that discovery should have been conducted to develop the factual foundation for the Report. TWCNYC simply bows to the procedural realities of the case as it is today. See *supra* n.B.

Second, the Report summarizes an investigation that occurred in the summer of 1995, closer in time to the activities in question than is the witnesses' testimony in this proceeding, and therefore likely to reflect a more accurate recollection of events. In addition, the underlying investigation was conducted by Liberty agents in a non-threatening environment, with the expectation that the Report would never be available to an adversary, leave alone to an ALJ charged with recommending a decision to grant or deny license applications. Therefore, the interviewees had no incentive to present their accounts in conformity with any particular litigation strategy, such as making a claim that the 19 unauthorized activations at issue here were inadvertent and merely an embarrassing episode in the company's otherwise exemplary history. Finally, the fact that the Report contains information that is against Liberty's interest -- Mr. McKinnon and Ms. Richter's knowledge of premature activations in 1993 -- suggests that the Report should receive greater weight than Liberty witnesses' testimony.

III. Liberty Made Material Misrepresentations To The Commission In Documents Filed In 1995, And The Report Shows That Liberty Knew That Such Statements Were False At The Time They Were Made.

24. The Report provides further evidence that Liberty knowingly made false statements to the Commission. In particular, the Report discloses that the majority of Liberty's microwave paths were activated without FCC authorization because Liberty did *not* have a practice of ensuring that FCC regulations were followed. Second Supp. Findings, *supra*, ¶ 8. Therefore, Liberty's statement in the Surreply that it "has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational" (TWCV Ex. 18, at 3), and its statement in the first 308(b) response that it "unwittingly commenced unauthorized service" to many locations (TWCV Ex. 21, at 14) are both false. TWCV Ex. 67; Second Supp. Findings, *supra*,

¶¶ 7-11; see also Supp. Findings, ¶¶ 23-29, 53-56, 71. Furthermore, at the time Liberty made these self-serving statements to the Commission, it knew that the statements were false; and the Report supports this conclusion. See Supp. Findings, ¶¶ 23-29, 53-56, 71; Second Supp. Findings, *supra*, ¶¶ 7-8, 10.

25. The Report contains two charts listing buildings that were activated with licenses pending (as opposed to granted), and buildings that were activated without authorization, but that were in compliance at the time of the compilation of the Report. TWCV Ex. 67, Exhibit B (Charts 2 and 3). Service to many of the buildings listed in Chart 3 was commenced prior to 1995, and prior to an application even being filed. TWCV Ex. 67, Exhibit B (Chart 3); see also Second Supp. Findings, *supra*, ¶ 8. In the face of this evidence, Liberty's claim in May 1995 that it was its "pattern and practice" to await authorization before commencing service, is completely unsustainable.

26. Moreover, the Report states that Mr. Nourain "did not monitor in any detail the progress of the applications for licenses and STAs filed by [Pepper & Corazzini], and he followed no system for informing himself or Liberty management of the status of applications." TWCV Ex. 67, at 8. Furthermore, Mr. Nourain

> did not continue the program to reconcile the FCC grants with the transmission paths, and as a result, Mr. Nourain stated that he did not know which grants went with which buildings. And fundamentally, Mr. Nourain did not wait to receive official documentation or otherwise verify grants for individual microwave paths before instituting service.

TWCV Ex. 67, at 8-9. Even though he had been told to do these things by Mr. Stern and Ms. Richter (Second Supp. Findings, *supra*, ¶¶ 13-14), Mr. Nourain had no system for monitoring the status of microwave applications; nor did he make it a habit of waiting to receive licenses or STAs before commencing service. Liberty therefore could not truthfully

assert that it had a "pattern or practice" of awaiting Commission authorization before turning on a microwave path.

27. Mr. Nourain knew that he had activated microwave facilities without authorization, that he had no system for monitoring Liberty's license application process at the time the Surreply was filed. Yet, on behalf of Liberty, he signed a declaration attesting to the truth and accuracy of the statements contained in the Surreply, including that it was Liberty's "practice and procedure" to await Commission authorization before commencing microwave service over a given path. TWCV Ex. 18; see also Findings, ¶¶ 60-65; Liberty Findings, ¶ 72.

28. Not only did Mr. Nourain know that there was no system for monitoring Liberty's license application process in place in 1995, but Mr. Price also admitted that it was not Liberty's practice to await authorization. Findings, ¶ 170; Price, Tr. 1588. In fact, Mr. Price testified that, when he signed his declaration regarding the truth of the statements contained in the Surreply, he understood that there was a divergence between Liberty's "policy" of abiding by the law and its actual pattern and practice. Findings, ¶ 170; Price, Tr. 1579-81.

29. Liberty, therefore, made a knowing, material misrepresentation to the Commission in the Surreply, because it knew that it did not follow any practice of awaiting Commission authorization before activating a microwave path. See Findings, ¶¶ 60-63, 170.

30. Liberty's statement in its first Section 308(b) response that it "unwittingly commenced unauthorized service" was, likewise, a knowing, material misrepresentation to the Commission, because Liberty knew that it was activating paths without licenses and

continued to so even after Liberty's management obtained knowledge of unauthorized activation in 1993. TWCV Ex. 21, at 14; see also Second Supp. Findings, *infra*, ¶¶ 31-34.

31. Liberty's persistent claim that, even though it was activating microwave paths prior to Commission authorization as early as 1992, its principals were not aware of any such activations until late April 1995 (see, e.g., Liberty Supp. Findings, ¶ 19), is also firmly refuted by the Report. The Report states that, "Mr. McKinnon was aware from Mr. Nourain that some buildings were being activated without a specific FCC license or STA." TWCV Ex. 67, at 11; see also id. at 12.

32. Mr. McKinnon left Liberty's employ in May of 1993, long before the date in late April 1995 when Liberty claims its principals *first* became aware of its premature microwave operations. TWCV Ex. 53 (McKinnon Deposition, 5/14/97), at 5. Thus, a Liberty principal knew of Liberty's premature activations no later than May 1993. This directly contradicts Liberty's repeated assertion that none of its principals knew of such premature operations until late April 1995. E.g., Liberty Supp. Findings, ¶ 49 & n.114.

33. The fact that Mr. McKinnon was aware of Liberty's premature microwave operations by May 1993 is circumstantial evidence that Mr. Price was aware of the premature operations before late April 1995. Mr. Price testified that he had weekly meetings with Mr. McKinnon to discuss Liberty's compliance with the licensing procedures. Price, Tr. 1353-54, 1441-42. Mr. Price stated that he had these meetings to "see that there was some kind of follow up" with regard to Liberty's licensing activities. Price, Tr. 1354. Mr. Price, therefore, was meeting on a weekly basis with the officer responsible for Liberty's licensing activities until that officer's departure in May 1993, yet Mr. Price claims to be

ignorant of the fact that Liberty was activating unlicensed microwave facilities until late April 1995. Such a scenario is hardly plausible.

34. Circumstantial evidence shows that Liberty's continuous and sustained (from 1992 to 1995) practice of activating microwave paths without receiving Commission authorization to do so was known to everyone in authority at Liberty. Liberty's senior management had weekly meetings to discuss planned microwave installations and activations. Findings, ¶ 87; E. Milstein, Tr. 1618; TWCV Ex. 14. Those meetings were attended by Messrs. Howard and Edward Milstein, and Messrs. Price and McKinnon (until 1993), all of whom were principals of Liberty. Findings, ¶¶ 12, 13; Price, Tr. 1441-42.

35. Liberty's FCC counsel also prepared periodic licensing inventories that listed the status of Liberty's applications and service. TWCV Exs. 58, 59; L/B Ex. 1; TWCV Ex. 34. Liberty, therefore, had sufficient information to know that it was operating microwave paths without authorization well before late April 1995. Liberty's claimed failure to have reviewed this information is not supported by any evidence other than the self-serving denials of its witnesses. See Supp. Findings, ¶ 92.

36. If the Presiding Judge is to believe Liberty's story that it absolutely did not know it was activating microwave paths without Commission authorization to do so until late April 1995 (see, e.g., Liberty Supp. Findings, ¶ 49 & n.114), then the Presiding Judge must believe that Liberty never looked at the license inventories prepared by its FCC counsel (TWCV Exs. 58, 59, 34; L/B Ex. 1), and never sought to compare the information contained in those inventories with the list of activated buildings contained in Liberty's "Weekly Operations Report." In light of Liberty's repeatedly-stated awareness of the importance of obtaining licenses from the Commission before commencing microwave service (e.g.,

Findings, ¶¶ 49-53), it is incredible for Liberty to claim that it never attempted to compare its list of activated facilities with information provided to it in license inventories prepared by FCC counsel. The only reason for having such an inventory is to be able to make such a comparison. Moreover, in the spring of 1993, such a comparison was made by Mr. Nourain and Ms. Richter while they were working on the first inventory. Supp. Findings, ¶¶ 19-22.

37. Finally, Liberty's 1995 statements that illegal activations had never happened before (see TWCV Ex. 18, at 2) were not only false and misleading, but were contradicted by information available to Liberty. All Liberty had to do was to compare the inventories provided it over the years by Pepper & Corazzini with its Weekly Operations Reports, and it would have seen at least some of the numerous unauthorized microwave activations. According to the charts attached to the Report, Liberty activated 93 paths without Commission authorization. TWCV Ex. 67, Exhibit B (Charts 2 and 3). If Liberty had performed even a cursory examination of the license inventories, it would have found at least one instance of premature activation. Had it discovered even one such instance, Liberty immediately would have been on notice that there may be others, and that further examination was warranted. Thus, Liberty's statement in 1995 that it had never before activated microwave paths without Commission authorization, was known to be, or should have been known to be, false.

IV. The Documents Attached To The Report Provide Further Evidence Of Liberty's Blatant Abuse Of The Discovery Process.

38. TWCNYC has previously described examples of Liberty's abuse of the discovery process in this proceeding. Findings, ¶¶ 213-36. The four documents attached to the Report are further evidence of Liberty's blatant and repeated abuse of discovery.

39. By Liberty's own admission, the four documents attached to the Report

> are the culmination of the many hours of attorneys' time spent in reviewing extensive documents and files as well as interviewing numerous Liberty personnel and agents. To the extent the Report's attachments disclose counsel's *separation of relevant from irrelevant facts*, it would reveal counsel's mental processes, conclusions and analyses. . .

Bartholdi Cable Co. v. FCC, 114 F.3d 274 (D.C. Cir. 1997), Brief of Petitioner, at 24 (emphasis added). Thus, Liberty deemed these four documents so relevant and so important to the investigation of its unauthorized microwave operations as to attach them to its Report, but then produced only one of them (TWCV Ex. 67, Exhibit D) during the normal course of discovery.

40. Of the remaining three documents, the Richter letter (TWCV Ex. 67, Exhibit F) was produced out of time, and only because the Presiding Judge ordered its production. Findings, ¶ 225. The two memos from Mr. Stern to Mr. Price, dated January 7, 1992 and June 16, 1992 (TWCV Ex. 67, Exhibits C and E, respectively), were not produced at all. Liberty claims not to have produced these documents because they were not within the established time period for documents that were to be produced during discovery. Liberty Opposition to TWCNYC's Motion, October 15, 1997, at 9. However, the two Stern memos are contemporaneous with scores of other documents produced during discovery, including the self-serving memo attached to the Report as Exhibit D.

41. Liberty, therefore, has no valid excuse for not producing all of the documents attached to the Report during the discovery period of this proceeding.

V. As A Matter Of Law, Liberty's Principals Knew In 1993 That Liberty Was Activating Microwave Paths Without FCC Licenses.

42. Liberty has repeatedly asserted that it cannot be charged with knowledge of its illegal microwave operations prior to late April 1995 because none of its "principals" knew

prior to that time. E.g., Liberty Supp. Findings, ¶ 49 & n.114. This assertion is false as a matter of fact and incorrect as a matter of law.

43. Mr. McKinnon knew that Liberty was operating illegally in 1993. See Second Supp. Findings, *supra*, ¶¶ 31-32. Mr. McKinnon was the Executive Vice President and Chief Operating Officer of Liberty from 1991 to May 1993. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 5. As such, Mr. McKinnon was a principal of Liberty.

44. Principals are "the individuals who control or own and will take part in making policies and conducting operations of the proposed station." WLOX Broadcasting Co. v. FCC, 260 F.2d 712, 715 (D.C. Cir. 1958) (referencing an FCC decision of August 6, 1957 in which the FCC adopted this definition of the word "principal"). As the person "responsible for the day-to-day operations," including the installation of cable and the activation of microwave service at new buildings, Mr. McKinnon fits squarely within the Commission's definition of a principal. TWCV Ex. 41 (McKinnon Deposition, 6/5/96), at 5-6; TWCV Ex. 67, at 10; accord Order, WT Docket No. 96-41, FCC 97M-177, at n.2 (rel. Oct. 24, 1997) ("[i]t is expected that the term [principal] includes at a minimum the executive officers, Messrs. Howard and Edward Milstein and Messrs. Price and McKinnon").

45. Mr. McKinnon's knowledge of Liberty's illegal operations in 1993 means that Liberty cannot rely on the mitigating factor that "none of its principals knew" it was operating illegally prior to late April 1995. Compare David A. Bayer, 7 FCC Rcd 5054, ¶ 15 (1992).

46. The fact that Mr. McKinnon stopped working for Liberty in 1993 does not change the conclusion that a principal knew of Liberty's illegal operations. The Commission has specifically addressed this issue, and has stated:

> Commission policy nonetheless holds that we might 'find that a corporate applicant lacks character and deny its application, when the individuals in corporate management technically responsible for any misconduct have long since departed.'

Character Policy Statement, 102 FCC Rcd 1179, ¶ 69 (1986).

47. Furthermore, the fact that at least one principal of Liberty -- and quite likely other principals as well (see Second Supp. Findings, *supra*, ¶¶ 33-34) -- knew that Liberty was operating illegally at the time Liberty filed its Surreply and first Section 308(b) response weighs against the mere imposition of a forfeiture. Compare David A. Bayer, 7 FCC Rcd 5054, ¶ 15 (company's "owners and senior managers were not involved in the misconduct and did not know of its occurrence until after [opponent's] petition was filed"). In light of this fact, combined with the other factors set forth in detail in TWCNYC's Supplemental Conclusions at paragraphs 114 to 123, denial of Liberty's pending applications is the most appropriate sanction to be levied against Liberty.

CONCLUSION

48. For the foregoing reasons, and for all of the reasons set forth in TWCNYC's Findings and Conclusions, Reply Findings and Conclusions, and Supplemental Findings and Conclusions, Liberty's pending applications should be denied, and the maximum statutory forfeiture permitted by law should be imposed on Liberty.